

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KELSEY K.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

Case No. 3:23-cv-06144-TLF

ORDER REVERSING AND
REMANDING DEFENDANT'S
DECISION TO DENY BENEFITS

Plaintiff filed this action pursuant to 42 U.S.C. § 405(g) for judicial review of defendant's denial of plaintiff's application for supplemental security income ("SSI"). Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73, and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. Dkt. 3. Plaintiff challenges the ALJ's decision finding that plaintiff was not disabled. Dkt. 5, Complaint.

After plaintiff's application for SSI was denied initially and upon reconsideration (AR 156, 174), a hearing was held before an ALJ in October 2020 (AR 70–106). The ALJ issued a decision finding plaintiff not disabled in February 2021 (AR 12–35) which was subsequently reversed by this Court in June 2022 (AR 2112–24).

Another hearing was held before the ALJ on May 23, 2023. AR 2048–84. The ALJ issued a decision finding plaintiff not disabled on August 25, 2023. AR 2017–47.

1 Plaintiff did not file exceptions with the Appeals Council, making the ALJ's decision
2 Commissioner's final decision subject to judicial review. See 20 C.F.R. § 416.1484(a).

3 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
4 denial of Social Security benefits if the ALJ's findings are based on legal error or not
5 supported by substantial evidence in the record as a whole. *Revels v. Berryhill*, 874
6 F.3d 648, 654 (9th Cir. 2017) (internal citations omitted). Substantial evidence is “such
7 relevant evidence as a reasonable mind might accept as adequate to support a
8 conclusion.” *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (internal citations
9 omitted). The Court must consider the administrative record as a whole. *Garrison v.*
10 *Colvin*, 759 F.3d 995, 1009 (9th Cir. 2014). The Court also must weigh both the
11 evidence that supports and evidence that does not support the ALJ's conclusion. *Id.*
12 The Court may not affirm the decision of the ALJ for a reason upon which the ALJ did
13 not rely. *Id.* Rather, only the reasons identified by the ALJ are considered in the scope
14 of the Court's review. *Id.*

15 DISCUSSION

16 **1. Plaintiff's statements regarding subjective symptoms**

17 Plaintiff argues the ALJ failed to properly assess her subjective symptom
18 testimony. Dkt. 10, Opening Brief. She testified she only leaves her house around three
19 days a week and is “lucky if [she] can take a walk around the block.” AR 2059. When
20 she leaves her house, she needs someone to go with her in case she falls or has a
21 breakdown or gets overwhelmed. AR 2064, 308.

22 Plaintiff stated that at least two days a week, she was bedridden and unable to
23 walk beyond her living room and bathroom. AR 2069–70. She sometimes had to use a
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1 cane for ambulating. AR 2072. In her function report, plaintiff stated that she had
2 difficulties with lifting, squatting, bending, standing, walking, sitting, kneeling, stair
3 climbing, memory, and completing tasks. AR 309. She testified in her first hearing that
4 she required a cart for walking long distances (AR 85), that it hurt to bend or pick up
5 things (AR 85), that pushing or pulling caused pain (AR 86), and she also experienced
6 pain during walking or sitting for a long period (*id.*).

7 The ALJ's determinations regarding a claimant's statements about limitations
8 "must be supported by specific, cogent reasons." *Reddick v. Chater*, 157 F.3d 715, 722
9 (9th Cir. 1998) (citing *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990)). In
10 assessing a Plaintiff's credibility, the ALJ must determine whether Plaintiff has
11 presented objective medical evidence of an underlying impairment. If such evidence is
12 present and there is no evidence of malingering, the ALJ can only reject plaintiff's
13 testimony regarding the severity of his symptoms for specific, clear and convincing
14 reasons. *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citing *Lingenfelter v.*
15 *Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)).

16 1. Objective Medical Evidence

17 The ALJ discounted plaintiff's testimony based on purported inconsistencies with
18 objective medical evidence. See AR 2033–35. Inconsistent medical evidence can be
19 "weigh[ed] as undercutting [Plaintiff's] testimony" but "an ALJ cannot insist on clear
20 medical evidence to support each part of a claimant's subjective pain testimony." *Smartt*
21 *v. Kijakazi*, 53 F.4th 489, 498 (9th Cir. 2022).

22 Discounting plaintiff's testimony about her physical symptoms, the ALJ found
23 inconsistent with that testimony evidence that plaintiff was able to walk on examination
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1 and mostly normal sensation, range of motion, tenderness, breathing and coordination.
2 AR 2033, 2035, 2038. The ALJ discounted plaintiff's testimony about her need to use an
3 assistive device because her gait was described as normal without an assistive device.
4 See AR 2033. Yet the evidence identified by the ALJ is not inconsistent with plaintiff's
5 testimony about her physical limitations. An ability to walk in the brief context of an
6 examination is not inconsistent with testimony that plaintiff cannot walk distances. Nor
7 does any of the evidence cited by the ALJ reveal anything related to plaintiff's abilities to
8 sit for prolonged periods or to bend, lift, or move without pain.

9 As this Court noted in its previous order, "multiple doctors and other medical
10 professionals diagnosed back, and shoulder, impairments that were extremely painful."
11 AR 2117 (citing AR 584–85, 1227–29, 1529, 1552, 1597, 1623, 1632, 1635, 1638,
12 1766, 2006). Considering the record as a whole, the ALJ's finding that plaintiff's
13 testimony about her physical limitations was inconsistent with the objective medical
14 evidence was not supported by substantial evidence.

15 However, the ALJ did properly discount some of plaintiff's subjective symptom
16 testimony based on its inconsistency with evidence. The ALJ found that plaintiff's
17 normal respiratory functioning was inconsistent with any alleged limitations stemming
18 from her asthma and that her evidence showed she had no complications stemming
19 from her diabetes. See AR 2033, 2035. Plaintiff does not raise arguments challenging
20 these assessments (see Dkt. 10 at 8–10), and, therefore, the Court finds they were not
21 erroneous.

22 The ALJ discounted plaintiff's testimony about the extent of her mental
23 impairments based on mental status examinations showing she had normal mood,
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1 affect, behavior, thought content, and judgment. AR 2034–35. The ALJ reasonably
2 found this inconsistent with plaintiff’s testimony that her mental impairments made it
3 difficult to be outside unaccompanied.¹

4 Plaintiff also challenges the ALJ’s assessment of her obesity, contending his
5 consideration failed to comply with SSR 19-2p. Dkt. 10 at 9. The Court, in its previous
6 order, found that the ALJ properly considered plaintiff’s obesity in a manner compliant
7 with SSR 19-2p. AR 2119. The ALJ gave the same consideration to plaintiff’s obesity in
8 his second decision as he did in his first decision. See AR 18, 20, 24, 2023, 2030. The
9 law of the case doctrine “generally prohibits a court from considering an issue that has
10 already been decided by that same court or a higher court in the same case.” *Id.* (citing
11 *Hall v. City of Los Angeles*, 697 F.3d 1059, 1067 (9th Cir. 2012)). The Court therefore
12 declines to reconsider its finding that the ALJ’s consideration of plaintiff’s obesity
13 complied with SSR 19-2p.

14 2. Activities of Daily Living and Inconsistent Statements

15 The ALJ discounted plaintiff’s testimony because it was purportedly inconsistent
16 with her activities of daily living. AR 2039. An ALJ may discount a claimant’s testimony
17 based on daily activities that either contradict their testimony or that meet the threshold
18 for transferable work skills. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007).

19 The ALJ cited evidence plaintiff was “able to shop in stores, take care of her
20 activities of daily living, prepare simple meals, manage money, use public
21 transportation, and perform light household chores.” AR 2039. These activities are not

22 ¹ The ALJ also summarized some parts of plaintiff’s function report in which she described her ability to
23 perform some mental tasks—“she had no problems getting along with others, she was never fired from a
24 job because of problems getting along with others, she can socialize, she can follow instructions, she
finishes what she starts, and she can pay attention.” AR 2039 (citing AR 304–15).

1 inconsistent with her testimony. Plaintiff acknowledged she went to stores and
2 sometimes left home and did not testify that she was completely incapacitated while at
3 home. See AR 2069–70. As this Court noted in its previous order (AR 2118), plaintiff
4 required the use of a DSHS-paid caregiver for her transportation and activities of daily
5 living (AR 82, 357) who, at the time of her most recent hearing, was approved to work
6 with plaintiff 168 hours per month (AR 2070). Given this evidence, the ALJ’s finding that
7 plaintiff was able to independently care for herself and take care of her activities of daily
8 living was not supported by substantial evidence.

9 The ALJ also discounted plaintiff’s testimony because of inconsistent statements.
10 AR 2031–32. An ALJ can consider “prior inconsistent statements” in rejecting a
11 claimant’s testimony. *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996).

12 The ALJ cited statements that were inconsistent with plaintiff’s testimony that—
13 as the ALJ described it—plaintiff “spends significant time in her bedroom or on the
14 couch, that she ‘just can’t move,’ and that she can’t even pick up her child.” AR 2031.

15 As an initial matter, this description is not supported by substantial evidence in
16 the record of plaintiff’s testimony. Plaintiff testified she was “bedridden” (or “confined to
17 the bedroom or the bed for . . . a large majority of the day”) on a “bad day,” which she
18 testified occurred “at least two days a week.” See AR 2069–70. She did not testify this
19 occurred every day. See *id.* Although she did testify, she “probably leave[s] the house
20 about three days a week,” the modifier “probably” suggests this was an attempted
21 estimate of her general routine rather than a comprehensive accounting of all the times
22 she left her house over the four-year relevant period. See AR 2059. She did testify
23 going out in public was difficult due to some logistical requirements (she lived far from a
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1 bus stop and tried to have someone with her when she left) but did not testify she never
2 left her home. See AR 2064.

3 Most of the alleged inconsistencies cited by the ALJ related to activities like
4 shopping, cooking, and attending some appointments. See AR 2031–32. As discussed,
5 these are not inconsistent with her testimony. Some of the alleged inconsistencies
6 simply showed plaintiff left the house—the ALJ cited, for instance, two treatment notes
7 indicating plaintiff went to a casino and one indicating she “went to a lot of places” to
8 assist her boyfriend with finding housing. See AR 2031. Such evidence that plaintiff
9 occasionally left her home is not necessarily inconsistent with her testimony.
10 Additionally, both statements were made in 2019; plaintiff made no statements in her
11 2020 hearing indicating she was as limited in her ability to leave the house (see AR 84–
12 89).

13 Some of the alleged inconsistencies involved plaintiff’s work experience. The ALJ
14 cited a few statements suggesting plaintiff worked during the relevant time. See AR
15 2032–33. Plaintiff testified she attempted two positions but was unable to do either
16 because of her impairments. See AR 2057–58. “It does not follow from the fact that a
17 claimant tried to work . . . and, because of [her] impairments, failed, that [s]he did not
18 then experience pain and limitations severe enough to preclude . . . substantial gainful
19 employment.” *Lingenfelter v. Astrue*, 504 F.3d 1028, 1038 (9th Cir. 2007).
20 Commissioner makes additional arguments regarding plaintiff’s testimony about her
21 work attempts (see Dkt. 12 at 4) but the ALJ made no such finding (see AR 2032–33).
22 The Court does not consider such inconsistencies. See *Brown-Hunter v. Colvin*, 806
23 F.3d 487, 494 (9th Cir. 2015) (“Although the inconsistencies identified by the district
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1 court could be reasonable inferences drawn from the ALJ's summary of the evidence,
2 the credibility determination is exclusively the ALJ's to make, and ours only to review.”).

3 3. Treatment

4 The ALJ discounted plaintiff's testimony because it was inconsistent with
5 conservative treatment. “[E]vidence of ‘conservative treatment’ is sufficient to discount a
6 claimant’s testimony regarding severity of an impairment.” *Parra v. Astrue*, 481 F.3d
7 742, 751 (9th Cir. 2007) (citing *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995)).
8 This is because “prescribe[ing] only ‘conservative treatment’ . . . suggest[s] a lower level
9 of both pain and functional limitation.” *Johnson*, 60 F.3d at 1434.

10 Here, the ALJ did not have substantial evidence to support a finding that
11 plaintiff's treatment was conservative, nor did the ALJ have substantial evidence to
12 support an inference that she experienced a lower level of pain. Her treatment involved
13 physical therapy, and medications taken daily which she alleged caused numerous side
14 effects. AR 88–89, 298–99, 311, 3441-3449. The record shows her treatment for pain
15 was complicated by obesity and diabetes.

16 Additionally, the ALJ failed to inquire as to whether further treatment was
17 available, or any other reasons plaintiff may have had for not seeking further treatment.
18 See SSR 16-3p (“We will not find an individual's symptoms inconsistent with the
19 evidence in the record on [the] basis [of the conservative nature of their treatment or
20 their failure to seek further treatment] without considering possible reasons he or she
21 may not comply with treatment or seek treatment consistent with the degree of his or
22 her complaints.”); see also *LaPeirre-Gutt v. Astrue*, 682 F. App'x 662, 664 (9th Cir.

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2010) (unpublished opinion) (“A claimant cannot be discredited for failing to pursue non-conservative treatment options where none exist.”).

Here, the record reflects an assessment by Dr. Andrew Tsoi, MD in March 2018, finding that plaintiff had moderate limitations due to a combination of impairments, and could perform sedentary work; and an assessment from Dr. Louis Enkema, MD, in September 2018, that plaintiff had osteoarthritis in her lumbosacral back with radiculopathy and sciatic pain, was severely limited due to chronic pain and other symptoms, and would be unable to perform even sedentary work for at least six months. AR 376-383 (Dr. Tsoi), 471-478 (Dr. Enkema). Dr. Robert Hander, MD, on 2-21-2018 found that plaintiff would be able to (with normal breaks) stand or walk for a total of two hours in an 8 hour work day, and would be able to sit for about six hours in an eight-hour work day, reported that sedentary capacity “seems generous.” AR 148-151. On reconsideration, Dr. J.D. Fitterer on 8-9-2019 agreed with Dr. Hander’s assessment of plaintiff’s ability to perform a job that would require two hours of standing or walking, and six hours of sitting. AR 184.

Dr. Christine Macatuno, MD, reported on October 26, 2020 her assessment that plaintiff would be able to sit for 30 minutes, and stand for 10 minutes, at one time, and would be able to sit and stand/walk for a total of less than two hours in an eight-hour work day, with breaks that are unscheduled every 15 to 30 minutes, for 15 minutes each, due to pain. AR 2007. Dr. Macatuno stated that plaintiff’s impairments had lasted, or would be expected to last at least twelve months. AR 2006. A central disc protrusion at L3-L4 and L4-L5 condition was diagnosed in November of 2020 (AR 2874-2875); physicians suggested the potential for surgical interventions in 2020 and 2022-2023 but

1 providers indicated such interventions were inappropriate due to plaintiff's obesity or
2 diabetes. See AR 2338, 2370, 2581, 2710-2712. The record also shows plaintiff
3 received a diagnosis, after an MRI on December 4, 2022, of mild degenerative disc
4 disease and facet arthropathy. AR 3460. The MRI indicated, "1. . . .The most
5 significant abnormality occurs at the L3-L4 level where a central disc protrusion has
6 resulted in a mild to moderate central canal stenosis and a mild left subarticular recess
7 stenosis. 2. A right paracentral disc protrusion at the L4-L5 level results in a mild central
8 canal stenosis and mild bilateral subarticular recess stenosis. 3. No neural foraminal
9 stenoses identified. . . . " AR 3460 (emergency department notes by Dr. Heather R.
10 Bowman, MD).

11 Because medical providers advised that surgery apparently was not a viable
12 option, purportedly conservative nature of her treatment was not a valid basis on which
13 to discount plaintiff's testimony.

14 The ALJ also noted at various points in his decision that plaintiff's condition
15 "improved" with treatment. See AR 2033–35, 2038–39. But the ALJ made no finding
16 that plaintiff's conditions were effectively controlled by such treatment. See *id.* "[S]ome
17 improvement" in a person's symptoms "does not mean that the person's impairments no
18 longer seriously affect her ability to function in a workplace." See *Holohan v. Massanari*,
19 246 F.3d 1195, 1205 (9th Cir. 2001).

20 This Court's previous order required the ALJ to discuss the alleged side effects of
21 plaintiff's daily medications. AR 2120. The Court noted the alleged "side effects included
22 exhaustion (constant), brain dysfunction, depression, constipation, nausea." *Id.* (citing
23 AR 88–89). The ALJ did so in a single sentence while describing plaintiff's activities of
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1 daily living: “While the claimant reports debilitating side effects from her medication, the
 2 aforementioned level of activity is not consistent with her allegations of severe and
 3 debilitating physical and mental symptomatology.” AR 2039. As discussed, the ALJ did
 4 not adequately assess plaintiff’s activities of daily living, and, therefore, the ALJ did not
 5 adequately assess plaintiff’s allegations about her medication side effects.

6 4. Harmless Error

7 The Court has found the ALJ failed to provide adequate reasons for discounting
 8 plaintiff’s testimony about her abilities to stand, walk, sit, lift, and bend, as well as her
 9 allegations of medication side effects. Because that testimony would potentially result in
 10 additional limitations in the residual functional capacity assessment (RFC), the RFC is
 11 deficient, and the error is not harmless. *See Carmickle v. Comm’r. Soc. Sec. Admin.*,
 12 533 F.3d 1155, 1160 (9th Cir. 2008).

13 2. Whether the Court should reverse with a direction to award benefits.

14 “The decision whether to remand a case for additional evidence, or simply to
 15 award benefits[,] is within the discretion of the court.” *Trevizo v. Berryhill*, 871 F.3d 664,
 16 682 (9th Cir. 2017) (quoting *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987)). If
 17 an ALJ makes an error and the record is uncertain and ambiguous, the court should
 18 remand to the agency for further proceedings. *Leon v. Berryhill*, 880 F.3d 1041, 1045
 19 (9th Cir. 2017).

20 The Ninth Circuit has developed a three-step analysis for determining when to
 21 remand for a direct award of benefits. Such remand is generally proper only where

22 (1) the record has been fully developed and further administrative
 23 proceedings would serve no useful purpose; (2) the ALJ has failed to
 24 provide legally sufficient reasons for rejecting evidence, whether claimant
 25 testimony or medical opinion; and (3) if the improperly discredited

1 evidence were credited as true, the ALJ would be required to find the
2 claimant disabled on remand.

3 *Trevizo*, 871 F.3d at 682-83 (quoting *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir.
4 2014)). The Ninth Circuit emphasized in *Leon* that even when each element is satisfied,
5 the district court still has discretion to remand for further proceedings or for award of
6 benefits. *Leon*, 80 F.3d at 1045.

7 Here, plaintiff asks that the Court remand for an award of benefits based on the
8 ALJ's errors in evaluating plaintiff's subjective testimony. The Court has found several
9 errors in the ALJ's evaluation of plaintiff's statements about symptoms and limitations,
10 several of which repeated errors of the prior ALJ in the Commissioner's previous
11 decision. The second prong of the credit-as-true analysis is therefore satisfied.

12 In *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004), the Ninth Circuit
13 "clarif[ied] that in the unusual case in which it is clear from the record that the claimant is
14 unable to perform gainful employment in the national economy, even though the
15 vocational expert did not address the precise work limitations established by the
16 improperly discredited testimony, remand for an immediate award of benefits is
17 appropriate." The Court found the ALJ would be required to find plaintiff disabled on
18 remand if her testimony were credited because Benecke's activities were "quite limited
19 and carried out with difficulty," she attempted to manage her pain, and she
20 unsuccessfully attempted to return to work. *Id.* at 596.

21 The Court found the record established the claimant could not perform gainful
22 employment, and remand for award of benefits was appropriate. *Benecke v. Barnhart*,
23 at 596.
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1 Like *Benecke*, in this case the plaintiff's activities were "limited and carried out
2 with difficulty" as they were carried out with the help of a caregiver 168 hours per week
3 (AR 2070) and, plaintiff testified, at the time of the second hearing she could not leave
4 her bed and surrounding areas about twice a week (AR 2069-2070). Plaintiff underwent
5 efforts to manage pain with multiple medications each day (AR 297-299), and she
6 attempted to return to work but was unsuccessful (AR 2057-2058).

7 The Court is mindful that plaintiff applied for benefits nearly six years ago, that
8 this Court has considered this case previously, and that providing another opportunity to
9 assess improperly evaluated evidence does not qualify as a remand for a "useful
10 purpose" under the first part of the credit as true analysis. *Garrison*, 759 F.3d at 1021-
11 22, (citing *Benecke v. Barnhart*, at 595 ("Allowing the Commissioner to decide the issue
12 again would create an unfair 'heads we win; tails, let's play again' system of disability
13 benefits adjudication.")).

14 However, based on a review of the record, the Court concludes that the record is
15 not free from important and relevant conflicts regarding date of onset, and the
16 Commissioner has the responsibility for resolving ambiguity in the medical evidence. In
17 this case plaintiff had a caregiver working 69 hours per month when she testified at the
18 first hearing (AR 357) and at the time of the second hearing she testified that her
19 caregiver worked 168 hours per month (AR 2069-2071) having increased from 158
20 hours; and about two days per week, she experienced her "worst" bedridden days when
21 she could not leave her bed and surrounding areas. There is ambiguity in the record
22 concerning identification of the point in time during the relevant four-and-a-half-year
23 period between the date of application and the date of the second hearing, when
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1 plaintiff's symptoms and limitations got to the point where she was having bedridden
2 days about two days per week. Ambiguity concerning date of onset requires a remand
3 for additional proceedings. *Diedrich v. Berryhill*, 874 F.3d 634, 638 (9th Cir. 2017). The
4 medical evidence is ambiguous about the extent to which plaintiff would or would not be
5 able to sustain employment in a sedentary occupation. See AR 2006-2010. When such
6 outstanding issues remain, the Court "cannot deem the erroneously disregarded
7 testimony to be true; rather, the court must remand for further proceedings." *Dominguez*
8 *v. Colvin*, 808 F.3d 403, 409 (9th Cir. 2015); *see also Washington v. Kijakazi*, 72 F.4th
9 1029, 1041-1042 (9th Cir. 2023).

10 Therefore, a remand for additional proceedings is the appropriate remedy.

11 CONCLUSION

12 Based on the foregoing discussion, the Court concludes the ALJ improperly
13 determined plaintiff to be not disabled. Therefore, the ALJ's decision is reversed and
14 remanded for further administrative proceedings to resolve ambiguity in the record
15 regarding the medical evidence of spinal pain and sciatic pain, side effects of
16 medications, and date of onset, consistent with this Order.

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18 Dated this 8th day of October, 2024.

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21 Theresa L. Fricke
22 United States Magistrate Judge
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